

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070557
	:	TRIAL NO. B-0607823
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
ALFRED JULIAN,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

On April 12, 2006, police used two informants to set up a drug buy. Police saw defendant-appellant Alfred Julian enter a van occupied by the informants. After arresting Julian, police searched him and found in his possession a marked \$20 bill that the informants had been given prior to the buy. No drugs were recovered.

On August 23, 2006, Julian and a female passenger were stopped for a license-plate violation. Julian gave police the false name of Robert Ruben. When Julian was told to exit from the car, he dropped marijuana on the ground. After a police dog alerted to the car console, police searched and found a compartment containing crack cocaine, powder cocaine, and a knife. The car was registered to a woman. Julian said that he had the car in his possession to install a radio and window tinting for the owner.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Police stated that when they began to talk about charging Julian's female passenger, Julian admitted that the drugs were his.

For the August 23 incident, Julian was charged with trafficking in crack cocaine, possessing crack cocaine, trafficking in cocaine, possessing cocaine, and carrying a concealed weapon. Following a jury trial, Julian was acquitted of the two trafficking charges and the concealed-weapon charge. The jury could not reach a verdict on the two possession charges. The possession charges were retried with a trafficking charge for the April 12 incident. Julian was acquitted of the trafficking charge. He was found guilty of both possession charges and was sentenced to 17 months' incarceration on one charge, consecutive to four years' incarceration on the second charge.

The first assignment of error alleges that the trial court erred in overruling Julian's motion for relief from joinder. Julian argues that he was prejudiced by the joinder for trial of the April 12 charge with the August 23 charges.

Even where a defendant claims prejudice, joinder is proper if the evidence as to each crime is simple and distinct or if the evidence of the other crimes would be admissible even if the counts are severed.² The evidence in this case was simple and distinct. The jurors clearly were able to segregate the proof and not cumulate the evidence of the offenses being tried, because they acquitted Julian of the April 12 trafficking charge.³ Julian cannot show prejudice because he was acquitted of the April 12 charge. The assignment of error is overruled.

The second assignment of error alleges that Julian was denied due process by the improper conduct of the prosecutor in asking leading questions, eliciting irrelevant and prejudicial testimony, and making improper arguments in closing.

² See *State v. Schaim*, 65 Ohio St.3d 51, 1992-Ohio-31, 600 N.E.2d 661.

³ See *State v. Allen*, 1st Dist. Nos. C-050010 and C-050011, 2006-Ohio-2338.

“[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.”⁴ The prosecutor’s conduct cannot be grounds for error unless the conduct deprives the defendant of a fair trial.⁵ Following a review of the record, we hold that none of the instances of alleged prosecutorial misconduct was so egregious as to affect Julian’s substantial rights or to deny him a fair trial. We point out that the trial court sustained objections to leading questions by both the prosecutor and defense counsel. The court also struck improper answers by witnesses and instructed the jury to disregard them. The “smoke and mirrors” comment by the prosecutor in closing argument was in response to defense counsel’s argument that the state was using “smoke screens.” The assignment of error is overruled.

Julian’s third assignment of error alleges that the trial court erred in denying his objection to the introduction of his statement into evidence, because it was substantially different from the one provided by the state in discovery.

Julian argues that the statement provided to defense counsel stated that Julian had said he wanted to cooperate with police to help his brother. Police testified at trial that Julian had said that he wanted to help himself and his brother by cooperating with police. Julian also argues that the state did not turn over to defense counsel the portion of his statement dealing with “specific things [Julian] could do to help police, such as identifying people he could purchase drugs from.”

The third assignment of error is overruled. There is nothing in the record to indicate that there was any willful discovery violation by the state. Further, we fail to see any prejudice to Julian. The jury was told that Julian had offered to cooperate with

⁴ See *Smith v. Phillips* (1982), 455 U.S. 209, 102 S.Ct. 940.

⁵ See *State v. Keenan* (1993), 66 Ohio St.3d 402, 613 N.E.2d 203.

police. Whether Julian wanted to help himself, his brother, or both, the fact remains that he offered to cooperate with police. How else would Julian cooperate other than identifying other drug dealers?

The fourth assignment of error, which alleges that Julian's convictions were based upon insufficient evidence and were against the manifest weight of the evidence, is overruled. Julian was caught driving a car with crack cocaine and powder cocaine hidden in it. Police testified that Julian had admitted the drugs were his. The jury did not believe Julian's story about why he was driving the car.

After viewing the evidence in the light most favorable to the prosecution, we hold that a rational trier of fact could have found that all the material elements of the crimes had been proved beyond a reasonable doubt.⁶ We also determine that the trier of fact, in resolving conflicts in the evidence, did not clearly lose its way and create such a manifest miscarriage of justice that Julian's convictions must be reversed and a new trial ordered.⁷

Julian argues his fifth, sixth, and seventh assignments of error together. The fifth assignment of error alleges that the trial court erred in entering a judgment based upon a "major discrepancy" between the indictment and the verdict form. The sixth assignment of error alleges that the trial court erred in convicting Julian of a second-degree felony for possession of crack cocaine, because the verdict form stated only that Julian had been found guilty of possessing cocaine. The seventh assignment of error alleges that the trial court erred in convicting Julian of two possession offenses because there was only one "act of possession" and, therefore, the offenses were allied offenses

⁶ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Roberts*, 1st Dist. No. C-040547, 2005-Ohio-6391.

⁷ See *State v. Thompson*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

of similar import. Julian also alleges under the seventh assignment of error that the trial court failed to notify him about post-release control.

The record shows that Julian was tried on counts two and four of his original indictment. For purposes of the jury verdict forms in Julian's second trial, the counts were renumbered. Original count two, which charged Julian with possessing crack cocaine, was renumbered to count one on the jury verdict form. Original count four, which charged that Julian had possessed cocaine, was renumbered to count two on the jury verdict form. The record shows that there was no confusion at trial. The jurors were informed of the charges they were considering. The trial court correctly instructed the jury on each charge. Everyone understood that count one referred to the crack cocaine and count two referred to the powder cocaine. There was no prejudice to Julian. The fifth assignment of error is overruled.

The verdict form for count one did not include the word "crack"; it only stated cocaine. Because of this deficiency, the trial court accepted Julian's argument that he could only be convicted of a fourth-degree felony on that count, the lowest degree of the charged offense, and it sentenced Julian to 17 months' incarceration. Therefore, Julian has already received the relief that he requests under the sixth assignment of error, and it is accordingly overruled. We note that the trial court's entry of judgment and sentence states that Julian was convicted of a second-degree felony on original count two, even though Julian was sentenced for only a fourth-degree felony on that count. Therefore, the case must be remanded to the trial court for a correction of the judgment entry to reflect a conviction on original count two for a fourth-degree felony.

Julian argues that because he engaged in "only one act of possession" he should have been convicted of only one offense. This argument fails. Julian was charged with possessing two different substances, crack cocaine and powder cocaine. Disparate

charges and penalties for possessing crack cocaine and powder cocaine are constitutional.⁸

Julian also argues that the trial court did not “accurately or completely” advise him about post-release control. Julian does not state how the trial court’s advice was inaccurate or incomplete. The court told Julian that he was subject to three years of post-release control and that if he committed an offense while on post-release control any sentence would involve consecutive time. The seventh assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed. The case is remanded to the trial court for correction of the judgment entry to reflect a conviction on count two for a fourth-degree felony.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DINKELACKER and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on November 26, 2008
per order of the Court _____.
Presiding Judge

⁸ See *State v. Woodson*, 5th Dist. No. 2007-CA-00151, 2008-Ohio-3519; *State v. Rogers* (May 21, 1998), 8th Dist. Nos. 72736 and 72737.